

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMETRIUS ALEXANDER BURKS,

Defendant-Appellant.

UNPUBLISHED

March 31, 2009

No. 284189

Emmet Circuit Court

LC No. 07-002770-FH

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). Defendant was sentenced to two years' probation with the first 11 months in jail, and was granted credit for 182 days served. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole argument on appeal is that he was denied the effective assistance of counsel at trial. Specifically, defendant argues that trial counsel's failure to request a jury instruction on accomplice testimony was deficient, and this deficiency prejudiced defendant and rendered the entire proceedings fundamentally unfair. We disagree.

Defendant did not preserve the issue of ineffective assistance of counsel because he failed to move for a new trial or an evidentiary hearing in the trial court. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). We review unpreserved issues of ineffective assistance of counsel for errors apparent on the record. *People v Moseler*, 202 Mich App 296, 299; 508 NW2d 192 (1993).

To succeed on a claim of ineffective assistance of counsel, a defendant must show that: (1) the acts of trial counsel do not meet an objective standard of reasonableness, *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984); (2) but for counsel's error, there is a reasonable probability that the result of the proceeding would have been different, *id.* at 694; and (3) that the result of the proceeding was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Trial counsel is presumed to have rendered effective assistance, and a defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246

(2002); *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). We will not substitute our judgment for that of trial counsel regarding matters of trial strategy, and will not assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

A confidential informant testified that on both March 6 and 7, 2007, defendant helped the informant purchase cocaine. On both days, the informant was equipped with a radio transmitter, a recording device, and \$250 in pre-recorded narcotics funds. On both days, the informant drove defendant to his cousin's house. A surveillance team of undercover narcotics officers monitored both trips. According to the informant, the informant gave defendant the \$250 so that defendant could buy some cocaine. Defendant met with his cousin, gave the cousin the money, and the cousin gave defendant the cocaine. Defendant then gave the cocaine to the informant. Ultimately, the informant handed over the cocaine to the officers. The informant, four members of the undercover narcotics unit, a female witness, and defendant's cousin all testified at trial.

The informant testified that she gave defendant \$250 on both days, and defendant gave her a quantity of cocaine in return. Testimony from the undercover officers established that: the informant drove to an apartment complex and picked up defendant; the informant and defendant drove to defendant's cousin's house; the informant and defendant returned to defendant's apartment complex; and finally, the informant returned and handed the cocaine to the command officer. An undercover officer was able to positively identify the informant's passenger as being defendant. The female witness testified that on March 6, 2007, she recognized defendant as he arrived at his cousin's house. The female witness and defendant embraced. The informant and an undercover officer testified to witnessing the hug.

Defendant's cousin testified that defendant came to his house on both March 6 and 7, 2007, and gave him money on both days. The cousin testified that on March 7, 2007, he gave defendant some marijuana. He also testified that officers searched his house on March 7, 2007, and found a large quantity of drugs, drug paraphernalia, and money. He did not testify that he gave cocaine to defendant.

The jury instruction concerning accomplice testimony cautions jurors to "examine an accomplice's testimony very closely and be very careful about accepting it." CJI2d 5.6(1). Jurors are also instructed that they "may think about whether the accomplice's testimony is supported by other evidence, because then it may be more reliable." CJI2d 5.6(2). Virtually all of the cousin/accomplice's testimony was corroborated by testimony given by other witnesses. The informant picked up defendant and drove him to his cousin's house both days. The female witness said that she saw defendant at the cousin-accomplice's house on March 6, 2007. An undercover narcotics officer positively identified defendant as the informant's passenger on March 7, 2007. The female witness testified that defendant hugged her in the cousin's driveway. The informant and an undercover narcotics officer witnessed the hug. An undercover officer testified that some of the pre-recorded narcotics funds were found in the cousin's wallet, and some were found in a safe in the cousin's house.

Defendant has not met his burden of proving that counsel rendered ineffective assistance. Defense counsel's strategy was to show that defendant was an innocent passenger along for the ride, and that the informant actually bought the cocaine directly from defendant's cousin. Testimony showed that defendant's cousin had a large quantity of drugs in his house, and had the

pre-recorded narcotics funds in his possession. When defendant was arrested, he had no drugs in his possession, and he did not have a large quantity of money. The cousin's testimony was not particularly damaging to defendant in that most of the testimony was corroborated by that of other witnesses. And most importantly, the cousin did not testify that he gave cocaine to anybody. Defense counsel had no reason to present defendant as an accomplice to a man who stored large quantities of drugs and money in his house. The decision not to request a jury instruction on accomplice testimony was trial strategy, and we cannot find that this strategy fell below an objective standard of reasonableness.

Moreover, even if the decision not to request the jury instruction was unreasonable, defendant was not prejudiced. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *People v Hill*, 257 Mich App 126, 138; 667 NW2d 78 (2003). Here, ample testimony exists upon which defendant could have been convicted. Defendant cannot show that there is a reasonable probability that the result would have been different if the jury instruction had been given.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Deborah A. Servitto